BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AIMEE STEFFAN	)	
Claimant	)	
	)	
VS.	)	
	)	
SOUTH CENTRAL MENTAL HEALTH	)	
Respondent	)	Docket No. 1,044,016
	)	
AND	)	
	)	
ACCIDENT FUND INS. CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the October 21, 2009, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that claimant proved it was more probably true than not that she was injured while working for respondent and that her injury arose out of and in the course of her employment. Dr. Stephen Grindel was authorized to be her treating physician, and respondent was ordered to reimburse claimant for medical mileage and out-of-pocket medical expenses.

Respondent argues that under a strict interpretation of K.S.A. 2008 Supp. 44-508(f), the "going and coming" rule, claimant's alleged work-related injuries are not compensable. In the alternative, respondent asks the Board to find that Dr. Paul Stein is the more appropriate physician to treat claimant's back and neck injuries.

Claimant has not filed a brief in this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a therapist who specialized in working with children. In the course of her employment, she drove weekly from her base office in Augusta, Kansas, to El Dorado, Kansas, for supervision meetings. She was reimbursed for her mileage on those trips. The supervision meetings would be held on Wednesdays from 11 a.m. to 12 noon. She would typically leave Augusta at 10:45 a.m., attend the meeting, and leave El Dorado at noon. She would arrive back at Augusta about 12:15 p.m. Claimant did not have to check in with her acting supervisor when she arrived back in Augusta. She would do paperwork until her normal lunch period, which was 12:30 p.m. to 1 p.m. Claimant is a salaried employee and considered herself to be on the clock during the travel period to and from El Dorado.

Claimant testified that in addition to the weekly travel to El Dorado for the supervision meetings, she also traveled to schools to counsel clients, as well as to homes. She would also travel for training, and those trips were to El Dorado and sometimes Wichita.

On January 7, 2009, claimant had traveled to El Dorado for a supervision meeting. She was on the way back to Augusta when she was rear-ended while stopped to make a left-hand turn. She said she did not think she told any of her coworkers that she was on her lunch break at the time of the accident. She had not made any stops between leaving the meeting in El Dorado and being rear-ended. Claimant was not on the property of respondent at the time of the accident.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

The "going and coming" rule contained in K.S.A. 2008 Supp. 44-508(f) provides in pertinent part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which

[1] K.S.A. 2008 Supp. 44-501(a).

[2] K.S.A. 2008 Supp. 44-508(g).

> is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

K.S.A. 2008 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[3] In *Thompson*,[4] the Kansas Supreme Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.

But K.S.A. 2008 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[5] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[6]

The Kansas appellate courts have also noted that the "going and coming" rule, does not apply when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[7] And it has been held that the "going and coming" rule is inapplicable when the travel is for a special purpose and when employees are paid for their travel time and/or expenses.[8]

In this case the accident did not occur on the respondent's premises. Nor was the claimant injured while using the only route available to or from work involving a special risk or hazard. Consequently, the statutory exceptions contained in K.S.A. 2008 Supp. 44-

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[3] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

[4] *Thompson* v. *Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[5] *Id*. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area controlled by the employer.

[6] *Id*. at 40.

[7] *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008); *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

[8] *Ridnour v. Kenneth R. Johnson, Inc.*, 34 Kan. App. 2d 720, Syl. ¶ 5, 124 P.3d 87 (2005), *rev. denied* 281 Kan. 1378 (2006).

508(f) are not applicable to this fact situation. But the analysis does not end with that determination. In this case the claimant was traveling because it was a requirement of her employment. Every Wednesday she was required to travel from Augusta to El Dorado to attend a supervision meeting. She was paid while making the trip and was reimbursed for her travel expenses.

In *Messenger* the Kansas Court of Appeals applied an exception to the "going and coming" rule that allows workers compensation coverage where travel on public roadways is an integral or necessary part of the employment.[9] An accident that occurred when Messenger was returning home from a temporary work site was held compensable because he was required to travel and provide his own transportation, he was compensated for his travel, and both Messenger and his employer benefitted from that travel arrangement. In holding that the "going and coming" rule did not apply, the Court of Appeals stressed the benefit that the employer derived from the travel arrangement.

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[10]

In *Kindel*,[11] the Kansas Supreme Court approved the *Messenger* decision and stated:

> Although K.S.A. 1991 Supp. 44-508(f), a codification of the longstanding "going and coming" rule, provides that injuries occurring while traveling to and from employment are generally not compensable, there is an exception which applies when travel upon the public roadways is an integral or necessary part of the employment. (Citations omitted.) Because Kindel and other Ferco employees were expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor, this case falls within the exception to the general rule.[12]

In a more recent decision, the Kansas Court of Appeals in *Brobst*[13] reiterated that accidents occurring while going and coming from work are compensable where travel is

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[9] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[10] *Messenger* at 437.

[11] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[12] *Kindel* at 277.

[13] *Brobst v. Brighton Place North,* 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

either (a) intrinsic to the job or (b) required to complete some special work-related errand or trip. The Court of Appeals stated:

> . . . Kansas case law recognizes a distinction between accidents incurred during the normal going and coming from a regular permanent work location and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself.
>
> Under this third qualification to the going and coming rule, injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is (a) intrinsic to the profession or (b) required in order to complete some special work-related errand or special-purpose trip in the scope of the employment. This third exception has been noted in several Kansas cases, many of which post-date the 1968 premises and special hazard amendments to the Workers Compensation Act.[14] (Citations omitted.)

This claim has certain similarities to the *Messenger* and *Kindel* decisions where it was determined that travel was an integral part of the job and in this case the travel to the weekly supervision meeting was an integral part of claimant's job. This case would also be analogous to the special errand exception and where the employees are paid for their time or travel expenses. This Board Member concludes that this weekly trip was an integral part of claimant's job or, in any event, a special purpose trip and at the time of the January 7, 2009, accident, her injury arose out of and in the course of her employment with respondent. Therefore, the accident is compensable under the Workers Compensation Act.

Respondent argues that as a consequence of the recent *Bergstrom*,[15] decision the only exceptions to the "going and coming" rule are the two specific exceptions enumerated in K.S.A. 2008 Supp. 44-508(f). In *Bergstrom*,[16] the Kansas Supreme Court recently held:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.

The court further held:

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[14] Brobst at 773 and 774.

[15] *Bergstrom v. Spears Mfg. Co.*, ___ Kan. ___, Syl. ¶ 1, 214 P.3d 676 (2009).

[16] *Id*.

> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.[17]

Respondent further argues that the inherent travel and special purpose exceptions to the "going and coming" rule are judicially created exceptions and, applying the strict literal construction rule of *Bergstrom*, should no longer be precedential.

This Board Member disagrees. The integral travel and special purpose findings in the reported judicial cases were simply judicial determinations that the "going and coming rule" was not applicable because the workers in those cases were in the course of employment when the accidents occurred. Stated another way, the workers were not on the way to work because the travel itself was a part of the job. This distinction was accurately noted in the concurring opinion in *Halford* where it was stated in pertinent part:

> I merely wish to add that the exception to the going-and-coming rule for travel that is intrinsic to the job is firmly rooted in the statutory language, even though many cases have referred to it as a judicially created exception. The statute provides that a worker is not covered "while the employee is on the way to assume the duties of employment." K.S.A. 4-508(f). Where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment"-he or she has already begun the essential tasks of the job. Such an employee is covered by the Workers Compensation Act and is not excluded from coverage by the going-and-coming rule.[18]

Moreover, the *Bergstrom* case neither construed K.S.A. 2008 Supp. 44-508(f) nor overruled any cases that have interpreted that statute and is factually distinguishable.

Respondent next asks the Board to authorize Dr. Stein in the event it finds claimant's injuries compensable. Claimant suffered neck and back pain in the accident and sought treatment from Dr. Grindel. She testified that she told respondent she was seeing Dr. Grindel when she filed her accident report. Respondent did not direct her to see any other medical provider until she was examined by Dr. Stein on August 4, 2009. Dr. Grindel treated her with heat packs and manipulation. He also ordered massage therapy. Claimant is currently pregnant, and her only treatment is manipulations by Dr. Grindel and the massage therapy.

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[17] *Id.*, Syl. ¶ 2.

[18] *Halford v. Nowak Const. Co.,* 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008).

After examining claimant on August 4, 2009, Dr. Stein concluded that claimant sustained a soft tissue injury to her neck and upper and lower back as a result of the January 7, 2009, motor vehicle accident. Because of her pregnancy, he did not recommend further testing but said she may require re-evaluation after the birth of her child if she still has symptoms. Dr. Stein further opined that although massage therapy and osteopathic manipulation may provide her some temporary benefit, they would not resolve her problem. He recommended that claimant perform back stretches at home and use heat.

This is an appeal from a preliminary hearing. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction.[19] In addition K.S.A. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred in finding that the evidence showed a need for medical treatment is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment. Therefore, the ALJ did not exceed her jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[20] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[21]

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 21, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2010.

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DAVID A. SHUFELT
BOARD MEMBER

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[19] K.S.A. 44-551(b)(2)(A).

[20] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[21] K.S.A. 2008 Supp. 44-555c(k).

c: Joseph Seiwert, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge